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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.C., a Minor.	
M.C. et al., Petitioners and Appellants, v. R.C., Objector and Respondent.	E071244 (Super.Ct.No. INA1700049) OPINION

APPEAL from the Superior Court of Riverside County. Dale R. Wells, Judge. Affirmed.

John L. Dodd & Associates, John L. Dodd for Petitioners and Appellants.

Lauren K. Johnson, under appointment by the Court of Appeal, for Objector and Respondent.

In this case, a child's maternal grandparents sought to terminate the parental rights of their granddaughter's sole living biological parent, her father, by demonstrating,

among other things, his intent to abandon his daughter. The trial court denied their petition. On appeal, the grandparents ask us to hold that the statutory presumption of intent to abandon that they established did not merely discharge their burden of producing evidence—meaning simply that it would carry their burden if unrebutted—but also shifted the ultimate burden to the father to prove he did not intend to abandon. They ask us to reject *In re Rose G.* (1976) 57 Cal.App.3d 406 (*Rose G.*) insofar as it held that the presumption is only one of producing evidence. We agree with *Rose G.* that the presumption affects only the burden of producing evidence. Because the grandparents' evidence did not compel a finding that the father intended to abandon his daughter, we affirm the judgment.

I. FACTS

A.C. was born in January 2008. Almost immediately, appellants, A.C.'s maternal grandmother and stepgrandfather (the grandparents), began caring for her: A.C. first spent the night at the grandparents' home when she was five days old, and the grandparents have been her guardians since 2009. A.C.'s mother, who was struggling with substance abuse, told the grandparents in December 2008 that she could no longer care for A.C. A.C.'s mother died in 2014.

When A.C. was born, it was not clear who her father was. In 2007, while pregnant, A.C.'s mother told R.C. that the child was his. Later, while still pregnant, the mother told R.C. that the child was not his. R.C. then immediately moved from Blythe, where the mother and R.C. were living separately, to San Diego. When A.C. was born,

her birth certificate listed only her mother. A couple of years later, R.C.'s mother saw a pamphlet for the Blythe Blue Grass Festival. The pamphlet contained a picture of a baby that looked "just like" her grandchildren. After learning from others that the baby was A.C., R.C.'s mother told R.C. to get a paternity test done. R.C. did so in 2010 and found out that he was in fact A.C.'s biological father.[1]

From 2010 to 2015, R.C. visited A.C. For the first two years, R.C. would travel to Blythe from San Diego. In 2012, R.C. lost his job and moved back to Blythe. Following the death of A.C.'s mother in 2014, R.C.'s "recreational" drug use became a substance abuse problem. The substance abuse, in addition to not having access to transportation to visit A.C. and the fact that the grandmother "made it clear" that she did not want R.C. to be around A.C., meant that R.C. only visited or contacted A.C. once in an approximately two-year span beginning in summer 2015.

R.C. completed a treatment program in April 2017 and has remained sober.

On October 6, 2017, the grandparents filed a petition under Family Code section 7802 to free A.C. from parental custody and control, alleging that R.C. had abandoned her.[2] The grandparents filed an adoption request the same day. A probation officer's report, filed in May 2018, recommended that the petition be granted.

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[1] R.C.'s parents, like appellants, are therefore also A.C.'s grandparents. In this opinion, however, we use the term "grandmother" to refer to appellant M.C., A.C.'s maternal grandmother, and, as previously noted, the term "grandparents" to refer to both appellants.

[2] Further unspecified statutory references are to the Family Code.

In July 2018, the trial court heard testimony from R.C., R.C.'s father, and the grandmother. The grandmother testified that, among other things, R.C. has never made any effort to be a father to A.C. R.C. testified that, regarding his lack of contact during the two-year period from 2015 to 2017, the grandmother "took the visitations away," and that he stayed away out of respect and so as to not make matters worse. During this time, R.C. wanted to "look for" A.C. "[e]very day" but, as he stated, did not want A.C. "to see a side of me that I couldn't stand." R.C. stated that, since completing his drug abuse treatment program, he has had a "good relationship" with A.C. R.C.'s father testified that he has seen positive changes in R.C. since R.C. became sober, and that R.C. "understands that he's got a lot of making up to do."

The trial court denied the petition. The trial court stated that the grandparents established the statutory presumption of intent to abandon pursuant to section 7822, subdivision (a)(2), but they ultimately failed to prove such intent by clear and convincing evidence.

The parties do not raise, and we therefore do not address, whether the petition to free A.C. from parental custody and control may be granted pursuant to Probate Code section 1516.5. (See *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1125-1126 [Probate Code § 1516.5 "'institute[d] a new procedure for the court to terminate parental rights when a child has been in the custody of a guardian for at least two years but there is no basis for the termination of parental rights except that it would be in the best interest of the child to be adopted by the guardian'"], citing Sen. Com. on Judiciary, Analysis of Sen. Bill No. 182 (2003-2004 Reg. Sess.) as amended Mar. 26, 2003, p. 4.)

II. DISCUSSION

A. *Applicable Law*

The grandparents sought to terminate R.C.'s parental rights under section 7802, which authorizes a proceeding "for the purpose of having a minor child declared free from the custody and control of either or both parents." One effect of such a declaration is that the child may be adopted without the consent of a biological parent. (§§ 8606, subd. (a), 8512.)

The Family Code lists several different grounds for the declaration, and the one at issue here is provided by section 7822, subdivision (a)(2), which allows the termination proceeding if "[t]he child has been [(1)] left by . . . the sole parent in the care and custody of another person for a period of six months [(2)] without any provision for the child's support, or without communication from the parent . . . [and (3)] with the intent on the part of the parent . . . to abandon the child."

A trial court must make findings under section 7822 based on clear and convincing evidence. (§ 7821.) This is because "[i]n parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing . . . interest favoring that standard is comparatively slight." (*Santosky v. Kramer* (1982) 455 U.S. 745, 758; see also *id.* at p. 761 [noting that for "foster parents," a "failure to prove permanent neglect may prolong the delay and uncertainty until their foster child is freed for adoption[,] [b]ut

for the natural parents, a finding of permanent neglect can cut off forever their rights in their child"].)

The principal issue in this appeal concerns the "intent on the part of the parent . . . to abandon the child" requirement of section 7822, subdivision (a)(2). As to that requirement, the law provides that "failure to . . . provide support, or failure to communicate is presumptive evidence of the intent to abandon." (§ 7822, subd. (b).) "'The questions of abandonment and of intent . . . , including the issue of whether the statutory presumption has been overcome satisfactorily, are questions of fact for the resolution of the trial court.'" (*In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491, 506.)

Where, as here, "the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals," "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) "Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'" (*Ibid.*) "The appellate court cannot substitute its factual determinations for those of the trial court; it must view all factual matters most favorably to the prevailing party and in support of the judgment." (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838.) "'"All conflicts, therefore, must be resolved in favor of the

respondent."'" (*Ibid.*) To the extent an appellant contends that a trial court did not properly interpret the relevant statutes, however, such issues are reviewed de novo. (*In re R.D.* (2008) 163 Cal.App.4th 679, 684.)

B. *Whether the Trial Court Properly Interpreted Section 7822*

The trial court found that the grandparents failed to establish by clear and convincing evidence that R.C. intended to abandon A.C. The grandparents contend that the trial court, in making this finding, misapplied the law in two ways. We conclude that neither was an error.

1. Whether the Trial Court Found That R.C. Rebutted the Presumption

At the hearing on the grandparents' petition, the trial court found that the grandparents had made the showing required for the section 7822, subdivision (b) (section 7822(b)) presumption of intent to abandon, did not explicitly state that the presumption was rebutted, and nevertheless held that the grandparents failed to establish intent. The grandparents argue that this means that the trial court wrongly required them to offer additional evidence of intent even after finding that the presumption applied, because the court never found that R.C. rebutted the presumption. That is, the grandparents argue that once the court found that R.C.'s failure to provide support or communicate was "presumptive evidence of the intent to abandon" (§ 7822(b)) they carried their burden absent an express finding that the burden was rebutted.

We disagree with the inference that the grandparents draw from the record. A "fundamental principle of appellate procedure" is that "a trial court judgment is ordinarily

presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment." (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609.) Here, although the trial court expressly found that the presumption of intent to abandon applied, it nevertheless denied the petition after hearing testimony from R.C. and R.C.'s father, among other evidence. The most plausible inference is that the trial court concluded that R.C. rebutted the presumption with evidence that he did not intend to abandon his daughter that sufficed to overcome the presumption. There is nothing in the record affirmatively indicating that the trial court misapplied the law regarding presumptions in the way the grandparents characterize, and there is no requirement that the trial court explain its reasoning in any more detail than it did. We will therefore not assume that the trial court required an initial showing from the grandparents of evidence of intent beyond what an unrebutted presumption would establish. Rather, we must make the reasonable assumption the trial court found that R.C. successfully rebutted the presumption—requiring additional evidence from the grandparents for that reason—even if the court did not explicitly say the presumption was rebutted.

2. Whether the Presumption Affects the Burden of Proof or Burden of Producing Evidence

The grandparents' most weighty issue is the meaning of the section 7822(b) presumption that the "failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon." The grandparents argue that this

presumption is not merely one affecting the burden of producing evidence, i.e., one that means only that they must prevail on an unrebutted showing of failure to provide support or communicate. Rather, they argue the presumption affects the burden of proof by placing it upon the parent who failed to support or communicate. In their view, R.C.'s evidence could not have rebutted the presumption once the burden of proof has become his. In this regard, the grandparents ask that we reject *Rose G.*, *supra*, 57 Cal.App.3d at pages 418 through 420, which concluded that the presumption, arising under section 7822's predecessor statute, affects only the burden of producing evidence. Because how we decide this issue affects the disposition of this appeal, we consider whether we agree with *Rose G.* about the presumption.[3] We hold that *Rose G.* correctly concluded that the section 7822(b) presumption affects only the burden of producing evidence.

The burden of producing evidence refers to the obligation of a party to "introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.) A presumption affecting the burden of producing evidence "is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, § 603.) In other words, such presumptions "are designed to dispense with unnecessary proof of facts that are likely to be true if disputed," such as the presumption that a mailed letter was received. (Cal. Law

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[3] The trial court stated that there was no clear and convincing evidence that R.C. intended to abandon, indicating its belief that the section 7821 burden of proof remained with the grandparents, and that they had not met it. If a showing of the section 7822(b) presumption affects the burden of proof, however, we would remand to the trial court to determine whether R.C. had satisfied that burden.

Revision Com. com., reprinted at 29B pt. 2 West's Ann. Evid. Code (1995 ed.) foll. § 603, p. 57.) "Thus, when the party against whom such a presumption operates produces some quantum of evidence casting doubt on the truth of the presumed fact, the other party is no longer aided by the presumption. The presumption disappears, leaving it to the party in whose favor it initially worked to prove the fact in question." (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 882 (*Rancho Santa Fe Pharmacy*).) In other words, once the presumption is rebutted, the trial court must "determine the existence or nonexistence of the presumed fact (1) without regard to the presumption; (2) with no change in the allocation of the burden of proof with respect to the presumed fact; and (3) by weighing the evidence as to the existence of the basic facts of the presumption and any appropriate inferences arising from these facts against the evidence as to the nonexistence of the presumed fact, and resolve the conflict." (*Rose G., supra,* 57 Cal.App.3d at p. 424, citing Evid. Code, § 604.)

The burden of proof, on the other hand, refers to the obligation of a party to "establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) A presumption affecting the burden of proof "is a presumption established to implement some public policy *other than* to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, § 605, italics added.) Although such presumptions also often "have an underlying basis in probability and logical inference," "[w]hat makes a presumption one affecting the burden of proof is the fact that there is always some further reason of policy

for the establishment of the presumption." (Cal. Law Revision Com. com., reprinted at 29B pt. 2 West's Ann. Evid. Code, *supra*, foll. § 605, p. 62.)[4] If the presumption operates, the disadvantaged party must prove the *nonexistence* of the presumed fact to a given degree of belief (e.g., preponderance of the evidence, clear and convincing evidence). (See *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 696-697 [ordinance providing, on a certain showing, for presumption that tenant was evicted in retaliation affected the burden of proof, so "the landlord [had] the burden of disproving the tenant's defense or case for damages, by requiring the landlord to prove to the trier of fact, by a preponderance of the evidence, that eviction was not retaliatory"]; Cal. Law Revision Com. com., reprinted at 29B pt. 2 West's Ann. Evid. Code, *supra*, foll. § 606, p. 64 ["[c]ertain presumptions affecting the burden of proof may be overcome only by clear and convincing proof"].) This is because "presumptions backed by policy concerns are justifiably given greater weight under our state's scheme." (*Rancho Santa Fe Pharmacy*, *supra*, 219 Cal.App.3d at p. 882.)

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[4] For instance, Evidence Code section 667 establishes a presumption that "[a] person not heard from in five years is presumed to be dead." The presumption has "an underlying basis in probability and logical inference" in that, in the absence of any indication to the contrary, it is reasonable to infer that a person not heard from in five years actually has died. But it is also good policy to distribute estates, settle titles, and generally move on with life without waiting for the absent person's normal life expectancy to have passed. (Cal. Law Revision Com. com., reprinted at 29B pt. 2 West's Ann. Evid. Code, *supra*, foll. § 605, p. 62.) Because of this policy, which is distinct from a mere rule of thumb applied in the absence of other facts, the Evidence Code section 667 presumption affects the burden of proof. (Cal Law Revision Com. com., reprinted at 29B pt. 2 West's Ann. Evid. Code, *supra*, foll. § 605, p. 62.)

"In the absence of specific statutory classification, the courts may determine whether a presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof . . . ." (Cal. Law Revision Com. com., reprinted at 29B pt. 2 West's Ann. Evid. Code, *supra*, foll. § 603, p. 57; see *Fisher v. City of Berkeley*, *supra*, 37 Cal.3d at pp. 696-697.)

In *Rose G.*, the County of Los Angeles Department of Adoptions filed a petition to declare two minors free from their parents' custody and control. (*Rose G.*, *supra*, 57 Cal.App.3d at pp. 411-412.) The petition was granted, and on appeal the parents challenged the presumption, then under Civil Code section 232, subdivision (a), on multiple grounds. (*Rose G.*, *supra*, at pp. 418-420.) After concluding that the presumption was rebuttable, the court then considered whether it affected the burden of proof or burden of producing evidence. The court concluded that the presumption furthered only the policy of facilitating disposition of the court action: "[W]e consider that the presumptive fact of an 'intent to abandon' constitutes a logical inference to be drawn from the basic facts of the presumption—a six-month period without provision for support by, or without communication from, such parent. A logical-inference presumption tends to indicate a policy of furtherance of the trial of the action and that such a presumption should be classified as a presumption that affects the burden of producing evidence. We find no other public policy that supports the . . . presumption." (*Id.* at pp. 419-420.) The court also stated that "[c]onsidering the importance of the opposing interests in such hearings, that of the government (as *parens patriae*) or other

interested person on the one hand, and the natural parents on the other, it would appear appropriate for the burden of proof to remain with the petitioner in [Civil Code former] section 232 proceedings, i.e., with the party seeking to terminate the parent-child relationship." (*Id.* at p. 420.) The presumption, the court concluded, "does *not* affect the burden of proof . . . ." (*Id.* at p. 421.)

Later cases considering this presumption have assumed that *Rose G.* was correct. For instance, in *In re B. J. B.* (1986) 185 Cal.App.3d 1201, the court "[a]ssum[ed] for the purposes of argument only that the presumption . . . is one affecting only the burden of production . . . ." (*Id.* at p. 1212.) As one commentator has noted, "[m]ost appellate courts that have dealt with the presumption of 'intent to abandon' in section 7822 and its predecessors . . . have given it only perfunctory or incidental attention and have simply reviewed the evidence on failure of support and failure to communicate." (Kristin M. Wirgler, *Part Four: Termination of Parental Rights: Abandonment as a Ground for Termination of Parental Rights*, (2007) 16 J. Contemp. Legal Issues 333, 339.) The grandparents contend that *Rose G.* incorrectly concluded that there is no policy behind the presumption in section 7822(b).

We, like the *Rose G.* court over 40 years ago, conclude that the presumption affects the burden of producing evidence, not the burden of proof. As a starting point, we observe that the situation here is unlike most others where courts must determine whether a presumption affects the burden of producing evidence or the burden of proof. Typically, courts in such scenarios ask whether there is some independent policy the

presumption serves, a question that may be "difficult" (*Fisher v. City of Berkeley*, *supra*, 37 Cal.3d at p. 696) and "often confusing" (*Rancho Santa Fe Pharmacy, supra*, 219 Cal.App.3d at p. 882) to answer. Here, however, we instead have an overriding independent policy to consider. We must construe the presumption, as well as the statutory scheme it is a part of, "to serve the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from the child's life." (§ 7800; see also *Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 162 ["the best interests of the child are paramount in interpreting and implementing the statutory scheme"].) Here, there is a clear independent policy that we must adhere to, but it is not clear from the subdivision alone which classification (burden of producing evidence or burden of proof) would better serve this goal.

With this in mind, we conclude that construing the presumption to make it harder for a parent to contest a petition—because the parent would need to prove the nonexistence of an intent to abandon rather than merely "produce[] some quantum of evidence casting doubt" on such an intent (*Rancho Santa Fe Pharmacy, supra*, 219 Cal.App.3d at p. 882)—would not serve the best interests of many children. There are instances where, despite some level of failure by a parent, receiving that parent's "care, custody, companionship, [or] management" (§ 3105, subd. (a)) *is* in the best interest of the child.[5] In those instances, requiring the parent to prove the nonexistence of an intent

[5] The United States Supreme Court has cautioned that assuming that "termination of the . . . parents' rights invariably will benefit the child" is "a hazardous assumption at best." (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 765 & fn. 15.)

to abandon may impede rather than advance the child's best interests. We believe a presumption that is less likely to determine the issue of termination in individual cases better enables trial courts to consider both the "best interest of the child" and the "fundamental liberty interest of natural parents in the care, custody, and management of their child." (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 753.) Section 7822(b) serves a laudable purpose in affecting the burden of producing evidence, by making it easy to prove a parent's intent to abandon where that intent is not meaningfully contested. Once a parent offers some quantum of proof rebutting that intent, it seems to us warranted to make the proof of termination no longer easy, but simply consistent with the general statutory burden.

No less important is the fact that, since *Rose G.* was decided, the presumption now found in section 7822(b) has been reenacted or amended by the Legislature on several occasions. "It is a basic rule of statutory construction that the Legislature is aware of court opinions existing at the time it amends legislation." (*Estate of Burden* (2007) 146 Cal.App.4th 1021, 1030.) Thus, "[w]hen a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475.) The presumption, previously arising under the Civil Code, has been amended or reenacted over a dozen times since *Rose G.* was decided, most notably in 1992, when "the Legislature enacted the Family Code" and "[i]n the process . . . repealed

the sections of the Civil Code governing actions to free a child from parental custody and control [citation] and reenacted these provisions without substantive change . . . ." (*In re J.W.* (2002) 29 Cal.4th 200, 205-206.)[6] These amendments and reenactments suggest the Legislature's approval of *Rose G.* regarding the presumption.

The grandparents contend that because Evidence Code section 605 lists the "'policy in favor of establishment of a parent and child relationship'" as an example of an independent policy, any presumption affecting parent and child relationships in general is one affecting the burden of proof.[7] There are a few reasons to be skeptical of this argument, however. For one, the Evidence Code section 605 presumption must "*favor* [the] *establishment* of a parent and child relationship." (Evid. Code, § 605, italics added.) A presumption that works in favor of severing a parent's legal relationship with his or her child does not promote the policy listed in Evidence Code section 605. For another, presumptions found elsewhere in the Family Code expressly state that they affect the

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[6] See also Stats. 1976, ch. 653, § 1, p. 1616; Stats. 1976, ch. 940, § 2, p. 2151; Stats. 1977, ch. 1252, § 75, p. 4315; Stats. 1978, ch. 391, § 1, p. 1240; Stats. 1978, ch. 429, § 23, p. 1340; Stats. 1978, ch. 1269, § 2, p. 4120; Stats. 1979, ch. 245, § 1, p. 532; Stats. 1982, ch. 978, § 1, p. 3525; Stats. 1983, ch. 309, § 2, p. 904; Stats. 1984, ch. 1246, § 1, p. 4263; Stats. 1984, ch. 1608, §§ 1, 9.5, pp. 5675, 5687; Stats. 1985, ch. 528, § 1, p. 1895; Stats. 1986, ch. 1122, § 1, p. 3972; Stats. 1987, ch. 1485, § 1, p. 5599; Stats. 1988, ch. 701, § 1, p. 2332; Stats. 1990, ch. 1363, § 5, p. 6097; Stats. 1991, ch. 372, § 2, p. 2039; Stats. 1992, ch. 162, § 10, p. 664; Stats. 2006, ch. 838, § 5, p. 6542; Stats. 2007, ch. 47, § 2, p. 218.

[7] In its entirety, Evidence Code section 605 reads as follows: "A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others."

standard of proof; construing all presumptions affecting parent and child relationships as ones affecting the burden of proof would tend to make these express statements superfluous. (See § 7612, subd. (a) [except as otherwise provided, "a presumption under Section 7611 [establishing natural parent status] is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence"], and former § 7555, subd. (a) ["There is a rebuttable presumption, affecting the burden of proof, of paternity, if the court finds that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is 100 or greater."].) Evidence Code section 605 does not indicate that all presumptions regarding the parent and child relationship affect the burden of proof.

The grandparents argue that because other presumptions pertaining to the parent and child relationship affect the standard of proof (see § 7612, subd. (a), and former § 7555, subd. (a)), the presumption under section 7822(b), affects the burden of proof under the maxim that "statutes in pari materia [i.e., "of the same matter" or "on the same subject"] should be construed together . . . ." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091). However, the fact that these provisions explicitly state that their presumptions affect the burden of proof, while section 7822(b) does not, suggests that the presumption under section 7822(b) affects only the burden of producing evidence.

The grandparents cite cases from two other states, one from Nevada (*Francisco M. v. Div. of Child & Family Servs, Dep't of Human Res.* (*In re C.J.M.*) (2002) 118 Nev. 724 [58 P.3d 188, 202 Nev. LEXIS 88]), and another from Wisconsin (*Odd S.-G. v. Carolyn*

S.-G. (*In re Kyle S.-G.*) (1995) 194 Wis.2d 365 [533 N.W.2d 794, 1995 Wisc. LEXIS 96]), but neither is applicable here. A Nevada statute provides that, other than in criminal cases, any presumption affects the burden of proof. (Nev. Rev. Stat. Ann. § 47.180(1) ["A presumption, other than a presumption against the accused in a criminal action, imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."]) Wisconsin has a similar default rule. (Wis. Stat. Ann. § 903.01 ["Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."] In neither of these states are courts tasked with classifying the presumption when the presumption itself does not make it clear. Accordingly, the cases provide no help to the grandparents.

We also see no indication that the rule the grandparents seek to apply here exists in those states that classify evidentiary presumptions as California does. Four states, Alabama, Florida, Hawaii, and Rhode Island, also divide evidentiary presumptions between those affecting the burden of producing evidence and those affecting the burden of proof based on whether the presumption is meant to implement a public policy other than facilitating the determination of the particular action in which it is applied. (21B

Wright et al., Federal Practice & Procedure (2d ed.) Evidence, § 5121.2; see Ala. R. Evid. Rule 301(c); Fla. Stat. Ann. § 90.303; Hawaii Rev. Stat. § 626-1, Rule 303(a); R.I. R. Evid. 303.) Two of these states, Alabama and Rhode Island, have rules creating a rebuttable presumption that a parent loses parental rights if the child has been abandoned for a given period. (Ala. Code 1975 § 12-15-319(b); R.I. Gen. Laws 1956 § 15-7-7(a)). The other two states have no such presumption. (Hawaii Rev. Stat. § 578-2(c)(1)(B); Fla. Stat. Ann. § 63.089(4).) We have not found any Alabama cases discussing whether the presumption affects the burden of producing evidence or the burden of proof. Cases from Rhode Island suggest that the presumption affects only the burden of producing evidence. (*In re Jazlyn P.* (R.I. 2011) 31 A.3d 1273, 1282 ["Although the burden of clear and convincing proof of unfitness always remains on the state, once a *prima facie* case has been established, 'the parent must present evidence demonstrating that his or her past abusive conduct no longer endangers the safety of a child.'"]; *In re Malachii O.* (R.I. 2017) 152 A.3d 1153, 1161, fn. 1 (dis. opn. of Flaherty, J.) ["It is well settled that '[t]he burden of [proof] never shifts' although 'the "burden of going forward" with the evidence . . . shifts from party to party as the case progresses.' [Citation.] . . . Accordingly, while the state's prima facie evidence of abandonment shifted a burden of production to respondent, he was capable of shifting the ultimate burden of proof back onto the state by producing some rebuttal evidence. Thereafter, the state was required to prove abandonment by clear and convincing evidence in light of all the evidence."].)

Accordingly, to our knowledge, none of these states have adopted the rule the grandparents seek to apply here.

In sum, as trial courts will have greater discretion to evaluate evidence to determine what is in the best interests of the child under a lighter presumption, the fact that the Legislature has repeatedly amended or reenacted former Civil Code section 232 and Family Code section 7822 without disapproving *Rose G.*, and the other reasons stated above, we find that the presumption provided by section 7822(b), affects the burden of producing evidence, not the burden of proof. Accordingly—and as the grandparents concede—R.C.'s statement that he did not intend to abandon A.C. was sufficient to rebut the presumption and require that the grandparents meet their statutory burden of proving R.C.'s intent to abandon. (See *Rancho Santa Fe Pharmacy, supra*, 219 Cal.App.3d at p. 882 ["when the party against whom such a presumption operates produces some quantum of evidence casting doubt on the truth of the presumed fact, the other party is no longer aided by the presumption"]; *Rose G.*, *supra*, 57 Cal.App.3d at p. 424 [evidence that mother "never, in her mind, reconciled herself to the loss of her daughters" was sufficient to make the presumption "disappear[]"].)

C. *Whether the Evidence Compels a Finding of Intent to Abandon*

The trial court found that the grandparents failed to establish by clear and convincing evidence that R.C. intended to abandon A.C. Although the grandparents point to various facts suggesting that R.C. may have intended to abandon A.C., such as the fact that R.C. actually left A.C. in the grandparents' care or that R.C. has not sought

custody over A.C., these facts are neither "(1) 'uncontradicted and unimpeached' [nor] (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'" (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) R.C. contradicted the grandparents' evidence of intent by stating that he never intended to abandon A.C., and he testified that his lack of communication and support from 2015 to 2017 was out of respect for the grandmother's wishes and due to a desire to not have A.C. "see a side of [him] that [he] couldn't stand" while he was in treatment for his drug problem. The grandparents' evidence here was insufficient to compel a contrary finding. We therefore find an insufficient basis for reversal.

We do not mean to suggest that whenever a parent states he or she did not intend to abandon a child, that statement alone is enough to defeat a finding of abandonment. It remains up to the trial court to determine the credibility and weight of such a statement in determining whether there is clear and convincing evidence that the parent left the child with the intent to abandon him or her. Here the trial court credited R.C.'s testimony enough to find that the grandparents failed to carry their burden. We "cannot substitute [our] factual determinations for those of the trial court . . . ." (*Dreyer's Grand Ice Cream, Inc. v. County of Kern*, *supra*, 218 Cal.App.4th at p. 838.)

D. *The Grandparents' Remaining Arguments*

The grandparents also argue that R.C.'s intent to abandon is not the proper issue on appeal. Citing *Adoption of Allison C.*, *supra*, 164 Cal.App.4th at page 1012, and *In re Marriage of Jill & Victor D.*, *supra*, 185 Cal.App.4th at page 504, the grandparents argue

that the relevant question on appeal is whether R.C. intended to relinquish his "parental role." The cited portions of those cases, however, discuss abandoning or abdicating the "parental role" only in the context of determining whether the child has been "left . . . in the care and custody of another person" (§ 7822, subd. (a)(2)), not in the context of intent to abandon (*Adoption of Allison C., supra,* at p. 1012 [child was left in the care and custody of another person where father "voluntarily abdicated the parental role"]; *In re Marriage of Jill & Victor D., supra*, at p. 504 ["In determining the threshold issue of whether a parent has 'left' his or her child, the focus of the law is 'on the voluntary nature of a parent's abandonment of the parental role rather than on *physical* desertion by the parent.'"]). Neither of these cases suggests that the intent in a section 7822 petition is intent of anything other than abandoning the child.

The grandparents also argue that the trial court committed prejudicial error by not considering appointing counsel for A.C. However, the grandparents provide no reason to conclude that A.C. had interests that were inadequately represented or protected by R.C. or the grandparents. (See *In re Jenelle C.* (1987) 197 Cal.App.3d 813, 818-819 [decision to not appoint counsel was not abuse of discretion where county Department of Social Services "was adequately protecting and representing the minor's interests"].)[8] Accordingly, even if the trial court did not consider appointing counsel for A.C., the

[8] The grandparents' comment, made in passing, that the trial court would have granted the petition had "experienced" counsel been appointed for A.C., is conclusory and insufficient to raise the issue of whether A.C.'s interests were adequately represented. "This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record." (*MST Farms v. C.G. 1464* (1988) 204 Cal.App.3d 304, 306.)

grandparents fail to demonstrate that A.C. was prejudiced by this failure. (See *In re Mario C.* (1990) 226 Cal.App.3d 599, 605-608 [failure to consider does not warrant reversal where minors are not prejudiced by the failure].)

III. DISPOSITION

The judgment is affirmed. R.C. is awarded his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.